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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GENE BUTTERFIELD, Defendant and Appellant.	G041100 (Super. Ct. No. 05SF0821) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed in part, reversed in part and remanded.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Pamela Ratner Sobeck, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

There was sufficient evidence to support numerous child abuse convictions, even though each act was not described with differentiation. The court did not err when it imposed separate punishments on counts 18, 19 and 20. The court did err in sentencing defendant pursuant to Penal Code section 667.61. (All further statutory references are to the Penal Code.) In all other respects, we affirm.

I

FACTS

A jury found defendant Robert Gene Butterfield guilty of 18 felonies and one misdemeanor, primarily sex crimes, against his two daughters, K. and C., and made numerous true findings regarding enhancements. He was found not guilty of one felony. The court sentenced him to 120 years to life plus a determinate term of six years eight months in prison.

On August 16, 2000, when K. was 11 years old, and her sister C. was eight years old, they were interviewed by a social worker. They both denied physical and sexual abuse. They were both reinterviewed on February 15, 2001, and again denied abuse. C. once again denied abuse on February 13, 2004.

Gabriel Ricci is a police officer for the City of Huntington Beach. In June 2004, he took a report regarding child abuse to K. He observed K. had "popped blood vessels in her left eye." Ricci referred the matter to child protective services. He did not ask K. whether or not she had ever been sexually abused by her father.

Aaron Parsons is a police officer assigned to the gang unit of the Costa Mesa Police Department. On July 24, 2005, in the evening he was driving past a motel along Harbor Boulevard when he saw a "physical fight going on inside the motel room." He "saw a large male choking a smaller stature female. . . . He was standing behind her. He had his arm around her like in a chokehold. I saw that he then forcibly took her and threw her with his arm and she flew across the room and landed on the ground." The man then picked up the female and choked her.

At trial, Parsons identified the man he saw in the window as defendant, and said that at the time defendant was six feet five inches tall and weighed approximately 275 pounds. He said he spoke with the young female who was being attacked, and identified her as K.

Parsons pulled over, called for additional units and went up to the room. When he got into the room, he smelled alcohol on defendant and observed that his eyes were watery and bloodshot. He said "the young female who I saw getting strangled and thrown across the room was lying in a fetal position in front of the couch." Four-year-old and five-year-old brothers of K. were sitting on the couch with the mother of the three children. Parsons observed injuries on the mother.

Mrs. Butterfield, the mother of the children, would not cooperate when Parsons asked her questions. When he questioned K., "she looked up at her mother . . . and began crying even louder and wouldn't answer [his] question." It appeared to Parsons that K. "did not want to speak to [him] in front of her mother." Parsons described what he observed about K.: "The injuries I saw were on the back of her neck in this area back here. She had a large red mark covering the entire upper portion of her neck. I also saw on her knees there was abrasions that appeared to be what I would call carpet burns or rug burns on both of her knees, and then on her back, it was covered in scratches and bruises."

When Parsons did have the opportunity to speak with K., he did not ask K. if defendant had ever sexually molested her. She told Parsons her father, defendant, had strangled her that night until she was almost unconscious and that he threatened her with a knife. She said he pulled out a switchblade and "threatened to shank her." She also said there had been prior physical abuse.

Cynthia Saxon is a senior social worker for Orange County Child Protective Services Department. She and an officer from the Costa Mesa Police Department went to the motel on July 25, 2005. Saxon observed the mother had a

swollen lip, and that K. had bruised arms and legs and marks on her neck. K. denied sexual abuse. That same evening, Saxon located and interviewed K.'s sister, C. At the end of her investigation, Saxon took the kids into protective custody.

K. was 19 when she testified. She and C. have three younger brothers. She said her family's living arrangements while she was growing up were "sporadic." Sometimes they lived in motels or with her grandmother or in an apartment. Her earliest memories with regard to her father is that "he was very abusive." She remembers one early time: "It stands out in my mind. We were in an apartment, and we lived off—we lived off Larson. It was in Garden Grove. And I believe I was four or five, and all I remember is I just remember running, like running into my room like away from him. And then I hit my face on a dresser, like I hit right here, and I just — even to this day, I still have a scar, and that's how I remember it."

She always understood that if she did not do what he wanted, she would be hit. It started out with spankings and increased in severity as she grew up. She was asked to describe the physical abuse, and she said: "I just remember — I don't really remember the physical abuse as I remember the sexual abuse." She was asked how she reacted, and said: "I just kind of closed up into myself. I mean, I couldn't really do anything. I was a seven-year-old girl."

Regarding physical abuse, K. said: "I remember one specific incident. I don't remember what I did wrong, but I remember he beat me with an extension cord, like one of those long orange ones. It was wrapped up because he used it while he was working, and I remember he hit me on the back with it — like on the back with it, and I was on the stairs at my grandmother's house. I remember that. I think I was like nine or ten maybe."

Twice he used his knife; one time the knife went through her sweatshirt and penetrated her skin. She continued: "There was shoes, coffee tables got thrown into me. I got thrown into things." When they moved out of her grandmother's house, when K.

was 14, "it like got really bad after we moved out and like we moved into the apartment because my grandma wasn't there, so she wasn't there to notice anything that was going on."

When her friends noticed bruises, she did not tell them her dad had beaten her. She explained: "Because he told me if I told anybody that he'd kill me."

K. said her parents drank constantly, and that "almost every time they drank," she witnessed her father physically abusing her mother. "I just remember him hitting her and like dragging her around by the hair."

She was asked about the June 2004 incident. She said it was her birthday. At that time she "had a broken nose and popped blood vessels on [her] left eye." She was at her friend's house when the police were called. A week earlier, according to K.: "I was doing laundry because that's what I did, like every once a week we did laundry. And I was outside hanging out with my friends waiting for one of the — waiting for the loads of laundry to be done, and I guess they had been done. And it was about dinnertime, and I hadn't gone back in the house yet to finish the laundry or fold it or anything. [¶] So I was — I was at the pool, and I remember him standing at the balcony yelling my name so I went inside. [¶] . . . [¶] He proceeded to yell at me and tell me that I don't deserve to be in this family and that, you know, he should bury me because I'm worthless and basically that I'm just scum. [¶] . . . [¶] . . . he made me call my boyfriend at the time and tell him that it was his fault that I was basically getting beaten, and I didn't say the right thing. . . . And as soon as I got off the phone, he punched me in the nose with a closed fist." K. described what happened next: "Um, I started bleeding everywhere so he ripped me up by the back of my hair and dragged me to the bathroom and told me to clean up the blood. When I was cleaning up the blood, I was standing by my shower, and then he hit me again in my eye." She then went to finish the laundry and he either kicked or threw the laundry basket at her. The basket scratched her in the face and legs. Her mother told her she deserved it.

K. said the sexual abuse by defendant started when she was seven years old. The two were home alone watching television. Defendant "turned on pornography." After they watched for a while, he took K. into the bedroom and touched her under her clothing. After that time, when K. was seven, eight and nine years old, the sexual abuse was groping and anal digital penetration. During that time, K. said defendant "would have me put my hands on his penis and get him to the point where he could ejaculate." K. said: "I could not say no because I was too afraid to. And I had tried a few times, and he would just get in a really bad mood and hit me or my brothers or my mom."

By the time K. was nine years old, the family was living above the garage at her grandmother's house. The first time he touched her vagina "skin to skin" was when she was nine years old. There was then digital penetration of her vagina "at least every month."

From age 10 to 11, "he started making me perform oral sex on him, and he still did the penetration of his fingers in my butt and my vagina, and I would still have to put my hands on him" to make him ejaculate. She was asked how many times she had to "give him oral sex from the time you were ten until he was arrested, approximately?" K. responded, "At least a hundred."

During the time when K. was between 11and 12, defendant did what he had done previously plus "he was also inserting his penis into my butt." K. said it was really painful. She was afraid to tell him to stop.

At times, people from social services came to the home. They specifically asked her if she was being abused, and they told her everything she told them would be kept confidential. K. testified she did not tell them about the abuse "because I was too afraid to." She further stated, "I thought that he was going to kill me or get someone else to do it."

From age 12 to 13, the sexual abuse continued. But defendant "started raping" K. The first time was on the floor of the room above the garage.

From age 13 to 14, defendant was having vaginal intercourse, anal intercourse, oral sex, "making [K.] masturbate him" as well as touching her every few weeks.

Between age 14 and 15, defendant committed the same acts with K. But the frequency increased to "almost daily at that point." K. explained: "My mom went to jail in October of '04 so he was having me sleep in his bed every single night, so it would happen every single night." Defendant continued having sex with K. until he was arrested.

When K. was 15, defendant came home early one day. Her brothers were playing with their race cars. She said, "My dad pushed [J.] into the T.V., and somehow like the corner of the T.V. hit his face right here. And it split his face open like, and there was just blood gushing everywhere."

One time when K. was 15 she was in her parents' room and marijuana "was forced in [her] mouth." She explained: "Um, my father had been telling me that, you know, it's fine. It's not going to do you any harm. And he then blew it in my mouth." After that, defendant gave her marijuana to use. She said she used it daily from January 2005 until defendant was arrested. Defendant also provided alcohol to her "probably three times a week" from when she was 16 until he was arrested.

Regarding the evening of July 24, 2005, when Parsons observed defendant beating K., K. B. described what happened. She said she came into the motel room, and "he told me, you know, I'm trash and I don't deserve to live here and told me to pack my stuff and leave and go walk out on Harbor because that's where I belong with all the . . . ."

After the police officer told K. he had witnessed what happened, she told him about it. At trial, she described the scene: "Um, he was hitting me with a closed fist on my head, neck, ribs, back, legs, basically on my entire body. And at some point he

took out his knife because he was going to shank me because I didn't deserve to live any more."

Later, when K. spoke with a social worker, she denied sexual abuse. At trial she was asked why, and said: "Because at the time I was still afraid that he was going to get out of jail." At that time, she did not know there had been allegations about sexual abuse of her younger sister. She further explained: "Um, I didn't tell anybody, and the reason that I let it continue is so that it would not happen to my sister, because I figured if he was doing it to me, that it wouldn't happen to her." Once she learned that C. had also been sexually abused, K. told authorities what happened to her.

C.B was 16 years old when she testified. She was asked about her earliest memories of physical abuse, and responded: "There wasn't a time where I don't remember it." She said she was terrified her whole life. She said she never told the social workers about the abuse because: "I was scared I would get hurt."

One time when K. had a bruise on her face after defendant hit her, the sisters were concerned people would ask about the bruise. They made up a story that C. "elbowed" K. When the police came to investigate, C. told them the made up story.

Defendant also sexually molested C. She was 11 years old, defendant told her to come into his room, take off her robe and lay on the bed. She said she was naked and facedown on the bed and defendant "touched me on my body and everywhere." He also touched "my vagina, my butt." She said defendant was naked and "he got on the bed, too, or he was already on the bed and he stuck his penis in my butt." He told her not to tell anybody. No other sexual activity happened after that. One time, but C. does not remember when it was, defendant showed her pornography of "women's breasts and vaginas."

C. saw her father in bed with K. on more than one occasion. C. said the first time she ever told anyone about sexual abuse was "when I was taken to Orangewood and I knew he was behind bars."

II

DISCUSSION

Section 667.61

Defendant contends the trial court imposed an unauthorized sentence under section 667.61, subdivision (b) on counts five, six, seven, twelve, thirteen and fourteen. He argues: "The court stayed the life sentences on counts 5 and 6 under section 654 because the counts arose from the same operative facts and against the same victim as charged in count 7. It also stayed the life sentences on counts 12 and 13 under section 654 because the convictions arose from the same facts and victim as count 14. Imposing life sentences on the stayed counts constituted revers[ible] error, as section 667.61, subdivision (g) expressly prohibits multiple life sentences for offenses to the same victim arising from the same occurrence at the same location. Staying the sentences under section 654 did not eliminate the error. A sentencing remand is required to correct these unauthorized life sentences."

The California Supreme Court held with regard to the life sentence dictated under section 667.61, subdivision (g), as it was written at all relevant times here,[1] "the Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior." (*People v. Jones* (2001) 25 Cal.4th 98, 107.) Section 654 precludes multiple punishment for two offenses arising from the same act or indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216.)

Here counts five, six and seven were all committed against K. between June 17, 2000 and June 16, 2001. Counts 12, 13 and 14 were all committed against C. between June 22, 2003 and June 21, 2005. The prosecutor informed the trial court it was

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[1] Amended by Senate Bill 1128 (2005-2006 Reg. Sess.), approved by Governor as an urgency measure effective September 20, 2006 (Stats. 2006, ch. 337); Initiative Measure (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2007)), effective November 8, 2006.

questionable whether or not counts five, six, seven, or whether counts twelve, thirteen and fourteen occurred on separate occasions. Accordingly, respondent concedes remand is necessary. We agree.

Sufficiency of Evidence

Defendant contends the evidence supporting counts two, three, four, five six, nine and eleven "came solely from testimony by [K.] describing in generic terms nonspecific acts of abuse spanning year-long time frames" and "lacked specific detail and failed to pinpoint individual criminal acts." He explains that "[w]hile this type of generic evidence may suffice for a conviction of continuous sexual abuse under section 288.5, it did not meet the minimum standard of sufficiency for a conviction under 288."

In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

In discussing the sufficiency of evidence in cases involving generic testimony of molestations, the California Supreme Court cautioned: "It must be

remembered that even generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific,* albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction. (Of course, prosecutors should exercise discretion in limiting the number of separate counts charged. No valid purpose would be served by charging hundreds or thousands of separate counts of molestation, when even one count may result in a substantial punishment.)" (*People v. Jones, supra,* 51 Cal.3d. 294 at p. 314.)

"[G]eneric child molestation charges by no means deprive the defendant of a reasonable opportunity to defend. Initially, of course, the defendant has the option of taking the witness stand and directly denying any wrongdoing. If credible, his testimony should prevail over the unspecific assertions of his young accuser. In some cases, the very nonspecificity of the child's testimony, especially if uncorroborated, may offer defense counsel fertile field for challenging the child's credibility. [Citations.] In addition to the defendant's direct testimony, his cross-examination of the child and supporting witnesses, and the availability of the cautionary instruction mandated by Penal Code section 1127f, the defendant may be permitted to introduce expert character evidence, based on standardized tests and personal interviews, to the effect that his personality profile does not include a capacity for deviant behavior against children. [Citation.] [¶] . . . the defendant may introduce evidence outlining the victim's past fabrications and offering innocent explanations for the victim's apparent knowledge of or familiarity with sexual behavior generally or the defendant's physical characteristics in particular, as well as expert testimony refuting or contradicting any physical evidence of molestation. [¶] . . . the defendant has a variety of procedural due process remedies available to obtain relief from unwarranted prosecution or punishment, including demurrers [citation], pretrial motions to set aside the information or indictment [citation], and motions for judgment of acquittal [citation], modification of verdict [citation] or new trial [citation]." (*People v. Jones, supra,* 51 Cal.3d. 294 at p. 320.)

The facts in *People v. Moore* (1989) 211 Cal.App.3d 1400, are very similar to those in the instant case: "While they were living in Signal Hill, defendant had sexual intercourse with her almost every night. Periodically, she would attempt to resist him. When she did so, defendant, who was trained in karate, would strike her in the stomach and rib cage with karate-type movements. During this same period, defendant asked M. to perform acts of oral copulation; she did this on three or four occasions." (*Id.* at p. 1404.) The court found there was substantial evidence to support the defendant's conviction for sodomy against a child under age 14. (*Id.* at pp. 1403, 1412.)

Defendant places a great deal of reliance on the holding of *People v. Van Hoek* (1988) 200 Cal.App.3d 811. "For all the foregoing reasons, we decline to follow the thesis of *People v. Van Hoek, supra*, 200 Cal.App.3d 811, and its progeny that generic testimony deprives the defendant of a due process right to defend against the charges against him." (*People v. Jones, supra,* 51 Cal.3d 294 at pp. 320-321.) We also decline to follow the case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

"(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (b)(1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] . . . [¶] (c)(1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall

be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child." (§ 288, subds. (a), (b)(1) and (c)(1).)

In her testimony, K. described the acts committed and the general time period when the acts occurred with sufficient specificity to support each of the counts challenged in this appeal. Under the circumstances in this record, we conclude sufficient evidence supports defendant's convictions.

Section 654

Defendant next contends the trial court erred when it imposed separate sentences on counts 18, 19 and 20. The Attorney General argues multiple punishments were appropriate here.

Section 654 requires that an act or omission that is made punishable in different ways by different provisions of the Penal Code may be punished under either of such provisions, "but in no case shall [it] be punished under more than one . . . ." This provision bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California, supra,* 55 Cal.2d at p. 19, italics added.)

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be

taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422.)

"(a)(1) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days. (§ 417, subd. (a)(1).)

With regard to defendant's punishment for the crime alleged in count 19, his argument is based on his assertion that both counts 16 and 19 arose from the July 24, 2005 incident. In fact, while count 16 was based on a crime committed on July 24, 2005, defendant was convicted on count 19 for an act committed between June 3, 2004 and June 17, 2004.

Defendant was convicted for violating section 422 when he committed the crime alleged in count 18 and for violating section 417, subdivision (a)(1) when he committed the crime alleged in count 20. We see nothing in the record before us to indicate defendant had the same intent when he threatened K. during the beating, prior to the time he pulled out his knife, as after he pulled out his knife and threatened to shank her. We must conclude the trial court implicitly found defendant harbored different criminal objectives when he committed these crimes. Accordingly, section 654 does not preclude imposition of punishment for both offenses.

III

DISPOSITION

We reverse the sentence because of error in applying section 667.61. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for resentencing.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.